PIHAK BERKUASA TATATERTIB MAJLIS PERBANDARAN SEBERANG PERAI & ANOR v. MUZIADI MUKHTAR

COURT OF APPEAL, PUTRAJAYA
ABDUL RAHMAN SEBLI JCA
ZALEHA YUSOF JCA
MARY LIM JCA
[CIVIL APPEAL NO: P-02(A)-1017-05-2017]
5 DECEMBER 2018

ADMINISTRATIVE LAW: *Judicial review – Local authority – Dismissal from service – Failure to give reasonable opportunity to be heard – Whether clear breach s. 16(4) of Local Government Act 1976 ('LGA') and reg. 29(1) of Public Officers (Conduct and Discipline) Municipal Council of the Province Wellesley Regulations 1995 ('1995 Regulations') – Whether right to be heard nullified by reg. 25(2)(a) of 1995 Regulations – Whether reg. 25(2)(a) in conflict with s. 16(4) of LGA and reg. 29(1) – Whether construction that favoured employee ought to be given – Whether mandatory for employee to be served with show cause notice – Whether failure to afford right to be heard rendered dismissal unsustainable in law*

STATUTORY INTERPRETATION: *Construction of statutes – Rule of construction – Right to be heard – Conflict between reg. 25(2)(a) of Public Officers (Conduct and Discipline) Municipal Council of the Province Wellesley Regulations 1995 ('1995 Regulations') with s. 16(4) of Local Government Act 1976 ('LGA') and reg. 29(1) of 1995 Regulations – Whether subsidiary legislation could not be inconsistent with or override Act of Parliament – Whether construction that favoured employee ought to be given – Whether reg. 25(a) void vis-à-vis s. 16(4)*

The respondent, an employee of the second appellant, was arrested and charged by the police for an offence under the Minor Offences Act 1955. The respondent pleaded guilty and was fined RM600, which he paid. Four years later, the second appellant received an anonymous letter pertaining to the respondent's involvement in the crime which led to the setting up of an internal investigation committee ('IIC') to investigate the allegation. At the hearing of the IIC investigation, the respondent admitted to having committed the offence he was charged with and that it was concealed from the appellant. Consequently, the first appellant resolved to terminate the respondent's employment 'in the public interest', a decision which the respondent rejected. Subsequently, the respondent was notified of the first appellant's decision to revoke the termination of his employment. However, on the same date, the respondent was informed that he was dismissed in accordance with reg. 39(g) of the Public Officers (Conduct and Discipline) Municipal Council of the Province Wellesley Regulations 1995 ('1995 Regulations') wherein he was dismissed without any benefits. Dissatisfied,

A the respondent applied for judicial review to quash the decision. It was common ground that the respondent was not given the opportunity of being heard before he was dismissed by the appellants. The High Court allowed his application and hence, the present appeal. The question that arose for the court's determination was whether reg. 25(2)(a) of the 1995 Regulations read B in conjunction with s. 17(1) of the Local Government Act 1976 ('LGA') and art. 135(2) of the Federal Constitution ('Constitution') nullified the respondent's right to be heard accorded to him by s. 16(4) of the LGA and reg. 29(1) of the 1995 Regulations.

Held (dismissing appeal)

C **Per Abdul Rahman Sebli JCA delivering the judgment of the court:**

(1) The failure by the appellants to give the respondent a reasonable opportunity of being heard was in clear breach of s. 16(4) of the LGA and reg. 29(1) of the 1995 Regulations, both of which encapsulated the common law concept of *audi alteram partem*. Regulation 25(2)(a) is D clearly in conflict with both s. 16(4) of the LGA and reg. 29(1). A subsidiary legislation could not be inconsistent, let alone override an Act of Parliament. Regulation 25(2)(a) of the 1995 Regulations was therefore void *vis-à-vis* s. 16(4) of the LGA. (paras 27, 31 & 33)

E **(2)** Both regs. 25(2)(a) and reg. 29(1) of the 1995 Regulations were made under the same section of the LGA, *ie*, s. 17(1). It was therefore untenable for the appellants to argue that reg. 25(2)(a) must take precedence over reg. 29(1) on the ground that it was made for the purpose of maintaining good conduct and discipline among officers and employees of the second appellant. It could equally be argued that F reg. 29(1) prevails over reg. 25(2)(a) as it provides, in unequivocal language and without qualification, that the employee is to be accorded a right of hearing before he is dismissed from his employment. Therefore, reg. 25(2)(a) which circumscribes the employee's right of hearing could not be construed as overriding or nullifying reg. 29(1) to G the detriment of the respondent. In any event, the provision, being inconsistent with s. 16(4) of the LGA, has no effect in law. (paras 43-46)

(3) The appellants' reliance on art. 135(2) of the Constitution was misconceived. It was common ground that the respondent was not a H public servant under art. 132(1) of the Constitution. Therefore, it was not open to the appellants to say otherwise. They could not be allowed to approbate and reprobate on the issue. Further, it was not the appellants' position, nor was it their pleaded case, that reg. 29(1) of the 1995 Regulations was *ultra vires* s. 16(4) and s. 17(1) of the LGA or I art. 135(2) of the Constitution and was therefore, valid. (paras 39 & 40)

(4) There was nothing of substance to the argument that s. 16(4) of the LGA must be read subject to s. 17(1) of the LGA. In a situation of statutory conflict, a construction that favoured the employee must be given, more so, where the employee's livelihood was at stake. Hence, the respondent must be given the benefit of s. 16(4) of the LGA and reg. 29(1) of the 1995 Regulations which accorded him a right of hearing, rather than to subject him to the provisions of reg. 25(2)(a) which denied him of that right. In the circumstances, it was mandatory for the appellants to serve a show cause notice on the respondent and affording him a reasonable opportunity of being heard as required by reg. 29(1) of the 1995 Regulations. Their failure to do so rendered the decision to dismiss the respondent unsustainable in law. (paras 41, 42 & 48)

Bahasa Malaysia *Headnotes*

Responden, seorang pekerja perayu kedua, ditangkap dan dituduh oleh polis atas satu kesalahan bawah Akta Kesalahan-Kesalahan Kecil 1955. Responden mengaku bersalah dan didenda RM600, yang dibayarnya. Empat tahun kemudian, perayu kedua menerima surat layang berkenaan penglibatan responden dalam jenayah tersebut menjurus pada pembentukan jawatankuasa siasatan dalaman ('JSD') untuk menyiasat dakwaan tersebut. Semasa perbicaraan siasatan JSD, responden mengaku terlibat dalam kesalahan yang dipertuduh terhadapnya dan menyembunyikan perkara itu daripada perayu. Akibatnya, perayu pertama memutuskan menamatkan pekerjaan responden 'demi kepentingan awam', satu keputusan yang ditolak responden. Kemudian, responden dimaklumkan tentang keputusan perayu pertama membatalkan penamatan pekerjaannya. Walau bagaimanapun, pada tarikh sama, responden dimaklumkan bahawa dia ditamatkan pekerjaan menurut peraturan 39(g) Peraturan-peraturan Pegawai Awam Majlis Perbandaran Seberang Perai (Kelakuan dan Tatatertib) 1995 ('Peraturan 1995') dan penamatan tersebut tanpa apa-apa faedah. Tidak berpuas hati, responden memohon semakan kehakiman membatalkan keputusan tersebut. Alasan bersama adalah responden tidak diberi peluang didengar sebelum penamatan kerja oleh perayu-perayu. Mahkamah Tinggi membenarkan permohonannya dan dengan itu, rayuan ini. Soalan yang timbul untuk pertimbangan mahkamah adalah sama ada peraturan 25(2)(a) Peraturan 1995 dibaca bersama-sama dengan s. 17(1) Akta Kerajaan Tempatan 1976 ('AKT') dan peraturan 135(2) Perlembagaan Persekutuan ('Perlembagaan') membatalkan hak responden untuk didengar yang diberi kepadanya oleh s. 16(4) AKT dan peraturan 29(1) Peraturan 1995.

A **Diputuskan (menolak rayuan)**

Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:

(1) Kegagalan perayu-perayu memberi responden peluang munasabah untuk didengar jelas melanggar s. 16(4) AKT dan per. 29(1) Peraturan 1995, yang kedua-duanya merangkumi konsep common law *audi alteram partem*. Peraturan 25(2)(a) jelas bercanggah dengan kedua-dua s. 16(4) AKT dan peraturan 29(1). Satu undang-undang subsidiari tidak boleh bercanggah atau mengatasi Akta Parlimen. Oleh itu, peraturan 25(2)(a) Peraturan 1995 terbatal berhubung s. 16(4) AKT.

(2) Kedua-dua peraturan 25(2)(a) dan peraturan 29(1) Peraturan 1995 dibuat bawah sekyen AKT yang sama iaitu, s. 17(1). Oleh itu, hujahan perayu-perayu bahawa peraturan 25(2)(a) mengatasi peraturan 29(1) atas alasan ia dibuat untuk tujuan mengekalkan kelakuan dan disiplin baik antara pegawai-pegawai dan pekerja-pekerja perayu kedua tidak boleh dipertahankan. Hujahan yang berpadanan boleh dibuat bahawa peraturan 29(1) mengatasi peraturan 25(2)(a) kerana peraturan itu memperuntukkan, dalam bahasa yang jelas dan tanpa syarat, bahawa pekerja perlu diberi hak didengar sebelum dia dibuang kerja. Oleh itu, peraturan 25(2)(a) yang mengehadkan hak pekerja untuk didengar tidak boleh ditafsir sebagai mengatasi atau membatalkan peraturan 29(1) sehingga memudaratkan perayu. Walau apapun, peruntukan tersebut, yang tidak konsisten dengan s. 16(4) AKT, tiada kesan undang-undang.

(3) Sandaran perayu-perayu pada peraturan 135(2) Perlembagaan adalah salah tanggap. Alasan bersama adalah responden bukan pegawai awam bawah peraturan 132(1) Perlembagaan. Oleh itu, perayu-perayu tidak boleh menyatakan sebaliknya. Mereka tidak boleh dibenarkan aprobat dan reprobat atas isu tersebut. Selanjutnya, tidak dinyatakan oleh perayu-perayu dan bukan kes yang diplid mereka bahawa peraturan 29(1) Peraturan 1995 *ultra vires* s. 16(4) dan s. 17(1) AKT atau peraturan 135(2) Perlembagaan, dan oleh itu, sah.

(4) Tiada kebenaran dalam hujahan bahawa s. 16(4) AKT perlu dibaca tertakluk pada s. 17(1) AKT. Dalam situasi percanggahan statutori, tafsiran yang berpihak pada pekerja perlu diberi, lebih-lebih lagi, apabila mata pencarian pekerja menghadapi risiko. Oleh itu, responden mesti diberi faedah s. 16(4) AKT dan peraturan 29(1) Peraturan 1995 yang memberi kepadanya hak untuk didengar, dan bukan menggunakan peraturan 25(2)(a) terhadapnya yang menafikannya hak tersebut. Berikutan itu, adalah mandatori untuk perayu-perayu menyerahkan notis tunjuk sebab atas responden dan memberi responden peluang

munasabah untuk didengar seperti yang diperlukan bawah peraturan 29(1) Peraturan 1995. Kegagalan berbuat demikian menjadikan keputusan menamatkan pekerjaan responden tidak boleh dikekalkan dari segi undang-undang.

Case(s) referred to:

Datin Azizah Abdul Ghani v. Dewan Bandaraya Kuala Lumpur & Ors And Another Appeal [1992] 4 CLJ 2071; [1992] 1 CLJ (Rep) 58 SC ***(refd)***

Kerajaan Malaysia v. Wong Pot Heng & Anor [1997] 2 CLJ 188 FC ***(refd)***

M Sentivelu R Marimuthu v. Public Services Commission Malaysia & Anor [2005] 3 CLJ 778 CA ***(refd)***

Mamat Talib (Timbalan Ketua Polis, Johor) & Anor v. Abdul Jalil Rashid [2005] 4 CLJ 892 CA ***(refd)***

Public Services Commission Malaysia & Anor v. Vickneswary RM Senthivelu [2008] 6 CLJ 573 FC ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Subramaniam Sannasy v. SAC II Syed Alwi Syed Hamid & Anor [2004] 1 LNS 325 HC ***(refd)***

Legislation referred to:

Federal Constitution, arts. 132(1), 135(2)
Interpretation Acts 1948 and 1967, s. 23(1)
Local Government Act 1976, ss. 16(4), 17(1)

For the appellants - Karin Lim, Murgan D Maniam & Cyrus Lim Kia Chun; M/s Presgrave & Mathews

For the respondent - Selvarani Naramasivoo; M/s Selvarani Naramasivoo & Co

[Editor's note: For the High Court judgment, please see Muziadi Mukhtar v. Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor [2017] 1 LNS 587 (affirmed).]

Reported by S Barathi

JUDGMENT

Abdul Rahman Sebli JCA:

[1] This appeal was against the decision of the High Court allowing the respondent's application for judicial review against the decision of the first appellant dismissing the respondent from the employment of the second appellant. We dismissed the appeal by a unanimous decision and these are our grounds.

[2] The appeal concerns the effect of two conflicting provisions in a subsidiary legislation on the right of an employee of a local authority to be heard before he is dismissed from his employment.

[3] The facts as outlined by the learned judge are not in dispute and they are as follows, with the necessary modifications. The respondent was employed by the second appellant as a Grade KP11 security guard with effect from 2 January 2008. He was promoted to the post of senior security guard Grade KP14 on 1 October 2011.

[4] Unknown to the second appellant, on 3 May 2010 the respondent was arrested by the police for being in unlawful possession of property (the source of which was unknown) under the Minor Offences Act 1955 ("the MOA").

[5] On 6 May 2010, the respondent was charged and he pleaded guilty to the offence in the Magistrate's Court at Bukit Mertajam and was fined RM600. He paid the fine. According to the respondent, he had informed his superior officer, one Hazani bin Omar, of his plea of guilt and payment of the fine of RM600 in the afternoon of 6 May 2010 itself and that no action was taken against him by the second appellant in connection with the case.

[6] There is no record however in the office of the respondent's head of department to show that the respondent had notified or informed his office of his conviction on 6 May 2010. The appellants' case was that they had no knowledge of the respondent's conviction.

[7] Four years later in October 2014, the Yang di-Pertua of the second appellant received an anonymous letter pertaining to the respondent's involvement in the crime resulting in his conviction by the Bukit Mertajam Magistrate's Court.

[8] Accordingly, an investigation was carried out by the Head of the Management Services of the second appellant. The second appellant wrote two letters, one dated 18 September 2014 and the other dated 24 October 2014 to the Bukit Mertajam Magistrate's Court to obtain information on the crime allegedly committed by the respondent.

[9] The Bukit Mertajam Magistrate's Court *vide* letter dated 30 October 2014 confirmed the respondent's conviction under the MOA. As a result, the second appellant set up an Internal Investigation Committee ("the IIC") to investigate the allegation in the anonymous letter.

[10] The IIC is an administrative committee established under the Public Officers Majlis Perbandaran Seberang Perai (Conduct and Discipline) Municipal Council of Province of Wellesley Regulations 1995 ("the 1995 Regulations") before any disciplinary action is instituted against any officer or employee of the establishment.

[11] The IIC carried out its investigation on 10 October 2014 and 15 October 2014, including a hearing on 17 October 2014 at which hearing the respondent admitted to having committed the offence he was charged with on 6 May 2010. He also admitted to concealing the information from the second appellant.

[12] Thereafter, the IIC forwarded its report on the investigation to the Yang di-Pertua of the second appellant. The second appellant then sent a report pursuant to reg. 34 of the 1995 Regulations by memo dated 26 December 2014 to the first appellant.

[13] On 17 February 2015, the second appellant submitted a paper to the first appellant to consider the appropriate punishment to be imposed on the respondent. The first appellant adjourned its consideration and requested for the submission of a performance appraisal report of the respondent from the second appellant, which report was submitted to the first appellant by the second appellant on 9 March 2015.

[14] On 24 April 2015, the second appellant submitted another paper to the first appellant to consider the appropriate punishment to be imposed on the respondent pursuant to regs. 34, 38 and 39 of the 1995 Regulations.

[15] At the meeting on 25 May 2015, the first appellant resolved to terminate the respondent's employment "in the public interest" with effect from 2 October 2015.

[16] Accordingly, the first appellant sent a letter dated 19 June 2015 to the respondent to terminate his employment in accordance with reg. 50 of the 1995 Regulations, ie, in the public interest. The respondent was required to submit certain documents for the purposes of calculating his pension and other retirement benefits.

[17] By letter dated 26 June 2015, the respondent rejected the decision of the first appellant to terminate his employment in the public interest. Through his solicitor's letter dated 19 August 2015, the respondent notified the second appellant of his dissatisfaction with the termination of his employment.

[18] Following the respondent's rejection of his termination in the public interest, on 3 September 2015 the secretariat of the first appellant submitted a paper to the first appellant to revoke the first appellant's decision to terminate the respondent's employment in the public interest. On the same date, it also prepared another working paper on the appropriate punishment to be imposed on the respondent.

[19] At the meeting on 4 September 2015, the first appellant decided to revoke the termination of the respondent's employment in the public interest with immediate effect. The respondent was notified by the second appellant of this decision by letter dated 4 September 2015. The revocation letter reads:

> PEMBATALAN PENAMATAN DEMI KEPENTINGAN AWAM
>
> Pihak Berkuasa Tatatertib, Majlis Perbandaran Seberang Perai di dalam mesyuaratnya yang ke-8/2015 pada 04 September, 2015, memutuskan Penamatan Demi Kepentingan Awam terhadap tuan sebelum ini melalui surat rujukan Bil.(87) dlm MPSP/10(P)9-82/35(SULIT) bertarikh 19 Jun 2015 adalah dibatalkan berkuatkuasa serta-merta.

[20] By a letter of even date, the respondent was informed that he was dismissed in accordance with reg. 39(g) of the 1995 Regulations (as opposed termination in the public interest decided earlier). The letter reads:

> 2. Sehubungan itu Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai di dalam mesyuaratnya yang ke – 8/2015 pada 04 Serptember 2015 adalah menimbang dengan teliti fakta kes dan kesalahan yang dilakukan oleh tuan, memutuskan bahawa tuan dengan ini dikenakan hukuman berikut mengikut Peraturan 39, Peratutan-Peraturan Pegawai Awam Majlis Perbandaran Seberang Perai (Kelakuan & Tatatertib) 1995.
>
> 39(g) Buang Kerja
>
> 3. Hukuman adalah berkuatkuasa mulai tarikh penerimaan surat ini. Sila tuan akui penerimaan surat ini dengan menandatangani Surat Akuan Terima yang disertakan dan dikembalikan.

[21] Thus, instead of termination of service in the public interest with full pension and retirement benefits, which the respondent rejected and which the first appellant revoked, the respondent was now dismissed with no such benefits.

[22] Dissatisfied with the decision, the respondent applied for judicial review to quash the decision. His application was allowed by the High Court, hence the present appeal by the appellants. The orders that he had sought, *inter alia*, were the following:

(i) An order of *certiorari* to quash the decision of the first and second appellants given by letter dated 4 September 2015 and received by him on 10 September 2015;

(ii) A declaration that his dismissal was null and void, not effective and to be set aside, and that he was to maintain his *status quo* in his original post as Senior Security Guard ('Pengawal Keselamatan Kanan') Grade KP14 with all benefits; and

(iii) Damages.

[23] There is no dearth of authority on the principle of law relating to judicial review, amongst them the following cases referred to by the learned judge in his grounds of judgment: *Mamat Talib (Timbalan Ketua Polis, Johor) & Anor v. Abdul Jalil Rashid* [2005] 4 CLJ 892; *M Sentivelu R Marimuthu v. Public Services Commission Malaysia & Anor* [2005] 3 CLJ 778; [2005] 5 MLJ 393; *Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu* [2008] 6 CLJ 573; [2008] 6 MLJ 1; *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145; *Datin Azizah Abdul Ghani v. Dewan Bandaraya Kuala Lumpur & Ors And Another Appeal* [1992] 4 CLJ 2071; [1992] 1 CLJ (Rep) 58; [1992] 2 MLJ 393; *Kerajaan Malaysia*

v. Wong Pot Heng & Anor [1997] 2 CLJ 188; [1997] 1 MLJ 437; *Subramaniam Sannasy v. SAC II Syed Alwi Syed Hamid & Anor* [2004] 1 LNS 325; [2004] 4 MLJ 415.

[24] These cases may not be exactly on point as they are not cases dealing with a situation where the dismissal of the employee was based on his conviction of a criminal offence as in the appeal before us but the general principles on the right of hearing discussed in those cases are still relevant and applicable.

[25] It was common ground that the respondent was not given the opportunity of being heard before he was dismissed by the appellants. This is clear from the affidavits affirmed by the respondent and the appellants during the judicial review application.

[26] Nor was it disputed that the respondent did not receive any warning, suspension, show cause letter or any letter from the appellants before he was dismissed from his employment. So, the question whether or not the respondent was given a right of hearing before he was dismissed did not arise for the High Court's consideration, nor for our consideration in the present appeal.

[27] The failure by the appellants to give the respondent a reasonable opportunity of being heard was in clear breach of s. 16(4) of the Local Government Act 1976 ("the LGA") and reg. 29(1) of the 1995 Regulations, both of which encapsulate the common law concept of *audi alteram partem* (hear the other side). For ease of reference, we reproduce below s. 16(4) of the LGA and reg. 29(1) of the 1995 Regulations:

> Section 16(4) of the LGA
>
> (4) The Commissioner of the City of Kuala Lumpur in the case of the Federal Territory, or the Mayor or President or his representative who shall be a Councillor, the Secretary and one other Councillor in the case of other local authorities, may appoint such persons to the offices shown on the list so approved and may reduce in rank or dismiss such persons from office and may appoint others in their stead:
>
> Provided that the reduction in rank or dismissal from office of any Head of Department or his Deputy shall not take effect until such reduction in rank or dismissal has been confirmed by the State Authority:
>
> Provided further that no officer or employee shall be reduced in rank or dismissed without being given a reasonable opportunity of being heard.

A Regulation 29(1) of the 1995 Regulations

> 29(1) The Disciplinary Authority sitting to consider a case where the breach of discipline complained of has been found to be of a nature which merits a punishment of dismissal or reduction in rank shall consider all the available information and where it appears that there is a *prima facie* case against the officer for dismissal or reduction in rank, the Disciplinary Authority shall direct that a statement containing the facts of the breach of discipline alleged to have been committed by the officer and any proposed ground on which the officer is to be dismissed or reduced in rank be sent to the officer and shall call upon him to make a written representation, containing the grounds upon which he relies to exculpate himself, within a period of not less than twenty-one days the date of receipt of the charge.

[28] Despite the clear provisions of s. 16(4) of the LGA and reg. 29(1) of the 1995 Regulations, learned counsel for the appellants contended that it was not a legal requirement for the respondent to be given a right of hearing, citing sub-reg. 25(2)(a) of the 1995 Regulations. For context, we reproduce below both sub-reg. (1) and sub-reg. (2) of reg. 25:

> (1) Subject to the provision of sub-regulation (2), no officer shall be dismissed or reduced in rank in any disciplinary proceedings under this Part unless he has been informed in writing of the grounds on which it is proposed to take action against him and has been afforded a reasonable opportunity of being heard.
>
> (2) Sub-regulation (1) shall not apply in the following cases:
>
> (a) where an officer is dismissed or reduced in rank on the ground of conduct in respect of which a criminal charge has been proved against him;

[29] Sub-regulation 25(2)(a) of the 1995 Regulations appears, on the face of it, to support the appellants' contention that there was no need for the disciplinary authority to give the respondent a right of hearing as a criminal charge had been proved against him. To fortify her argument, learned counsel for the appellants referred us to art. 135(2) of the Federal Constitution ("the Constitution") which provides as follows:

> (2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:
>
> Provided that this Clause shall not apply to the following cases:
>
> (a) where a member of such a service is dismissed or reduced in rank on the ground of conduct in respect of which a criminal charge has been proved against him;

[30] The question for our determination was whether reg. 25(2)(a) of the 1995 Regulations read in conjunction with s. 17(1) of the LGA and art. 135(2) of the Constitution nullified the respondent's right to be heard accorded to him by s. 16(4) of the LGA and reg. 29(1) of the 1995 Regulations. A

[31] There can be no argument that reg. 25(2)(a) of the 1995 Regulations is in conflict with both s. 16(4) of the LGA and reg. 29(1) of the 1995 Regulations. Whilst the latter two provisions provide for a right of hearing before an employee is dismissed from his employment, the former provides for the complete opposite. This is a classic case of the left hand taking away what the right hand has given. B C

[32] On behalf of the appellants, the main plank of learned counsel's argument was that s. 16(4) of the LGA must be read subject to reg. 25(2)(a), which was made under s. 17(1) of the LGA. Counsel went so far as to argue that s. 16(4) is "dependent" on s. 17(1). What counsel meant to say, for all intents and purposes, was that having regard to the provisions of s. 17(1) of the LGA, reg. 25(2)(a) of the 1995 Regulations overrides not only reg. 29(1) but also s. 16(4) of the LGA. D

[33] To this argument, we need only say that a subsidiary legislation cannot be inconsistent, let alone override an Act of Parliament. Regulation 25(2)(a) of the 1995 Regulations is therefore void *vis-à-vis* s. 16(4) of the LGA, which is an Act of Parliament: See s. 23(1) of the Interpretation Acts 1948 and 1967 which provides: E

> (1) Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency. F

[34] This provision was dealt with by the Supreme Court in *Datin Azizah bte Abdul Ghani (supra)* where Abdul Hamid Omar LP delivering the judgment of the court said at p. 64 (CLJ); pp. 398-399 (MLJ):

> In our view it is a settled policy of the legislature that an Act of Parliament lays down the general principles of the law and to delegate to subordinate authorities the power of making rules for the purpose of settling administrative details and of providing the necessary procedures for giving effect to the general principles of the Act. When, therefore, an Act of Parliament enables an authority to make regulations, a regulation which is validly made under the Act, must be regarded as though it were itself an enactment. But any rule made under an Act of Parliament cannot be intended to override the specific provisions of the Act itself. Under ss. 23 and 87 of the Interpretation Acts 1948 and 1967 (Act 388), any rule which is inconsistent with an Act of Parliament is void to the extent of the inconsistency. G H I

[35] Section 17(1) of the LGA stipulates as follows:

> (1) A local authority may, with the approval of the State Authority, from time to time make rules for the purpose of maintaining good conduct and discipline among officers and employees, and may impose any punishment upon any such officer or employee who is guilty of misconduct or breach of duty in the exercise of his official functions:
>
> Provided that no punishment shall be imposed on any Head of Department or his Deputy without the prior approval of the State Authority.

[36] Learned counsel for the appellants was right of course in pointing out that reg. 25(2)(a) was a rule that was made by the second appellant under s. 17(1) of the LGA with the approval of the State Authority and for the purpose specified in s. 17(1), namely:

> for the purpose of maintaining good conduct and discipline among officers and employees.

[37] It was further submitted by learned counsel for the appellants that s. 16(4) of the LGA is a general provision, and being a general provision, it must give way to s. 17(1) under which reg. 25(2)(a) was made by the local authority for the specific purpose of maintaining good conduct and discipline among officers and employees of the second appellant.

[38] Before we delve further into the conflict between reg. 25(2)(a) and reg. 29(1) of the 1995 Regulations, we think it is appropriate at this juncture to deal straight away with art. 135(2) of the Constitution which learned counsel for the appellants relied on for her proposition that since the respondent had been convicted of a criminal offence, he had no right to be heard before he could be dismissed from his employment. The basis for the argument was that reg. 25(2)(a) of the 1995 Regulations is "similar in context" to art. 135(2) of the Constitution.

[39] With due respect to learned counsel, we must say at the outset that her reliance on art. 135(2) of the Constitution was misconceived. First of all, it was common ground that the respondent is not a public servant under art. 132(1) of the Constitution. This was acknowledged by the appellants themselves through learned counsel's submission as follows:

> Article 135(2) of the Federal Constitution does not apply to employees or officers of Local Authorities as service in the Local Authorities does not come within Clause 1 of Article 132 of the Federal Constitution.

[40] It was therefore not open to the appellants to now say otherwise. They cannot be allowed to approbate and reprobate on the issue. Furthermore, it was not the appellants' position, nor was it their pleaded case that reg. 29(1) of the 1995 Regulations is *ultra vires* s. 16(4) and s. 17(1) of the LGA, or art. 135(2) of the Constitution and therefore invalid.

[41] Coming back to learned counsel for the appellants' argument that s. 16(4) of the LGA must be read subject to s. 17(1) of the LGA, we found nothing of substance to the argument. In the first place, s. 16(4) does not say that it is subject to s. 17(1) or to any regulation made thereunder. The Legislature would have said so if it had so intended. In the absence of such qualification, there was no basis for learned counsel to suggest that s. 16(4) is subject to s. 17(1) or worse, "dependent" on it.

[42] In our view, in a situation of statutory conflict as in the present case, a construction that favours the employee must be given, more so where the employee's livelihood is at stake. In the context of the present appeal, the respondent must be given the benefit of s. 16(4) of the LGA and reg. 29(1) of the 1995 Regulations which accord him a right of hearing, rather than to subject him to the provisions of reg. 25(2)(a) which denies him of that right.

[43] It is important to bear in mind that both reg. 25(2)(a) and reg. 29(1) of the 1995 Regulations were made under the same section of the LGA, ie, s. 17(1). It was therefore untenable for the appellants to argue that reg. 25(2)(a) must take precedence over reg. 29(1) on the ground that it was made for the purpose of maintaining good conduct and discipline among officers and employees of the second appellant.

[44] The fallacy of the argument lies in the fact that it could equally be argued that reg. 29(1) prevails over reg. 25(2)(a) as it provides, in unequivocal language and without qualification, that the employee is to be accorded a right of hearing before he is dismissed from his employment. In this regard, it is relevant to note that reg. 29(1) comes after reg. 25(2)(a).

[45] Regulation 25(2)(a) which circumscribes the employee's right of hearing cannot in our view be construed as overriding or nullifying reg. 29(1) to the detriment of the respondent. There is, of course, the possible argument that reg. 25(2)(a) deals with the specific scenario of a proven criminal charge and that in such a case no reasonable opportunity of being heard as required by reg. 29(1) needs to be given, *generalia specialibus non derogant*.

[46] But that, in any event, does not answer our view that it is void for being inconsistent with s. 16(4) of the LGA. A void provision has no effect in law. The fact that it is "similar in context" to art. 135(2) of the Constitution as submitted by learned counsel for the appellants is of no consequence if otherwise it is void and has no legal effect.

[47] It is up to the local authority, in this case the second respondent, to rectify the situation if it deems it necessary so to do. Unless and until this is done, it is grossly unfair to deny the respondent of the right of hearing accorded to him by s. 16(4) of the LGA and reg. 29(1) of the 1995 Regulations.

[48] In the circumstances, we endorse the learned judge's view that it was mandatory for the appellants to serve a show cause notice on the respondent and affording him a reasonable opportunity of being heard as required by reg. 29(1) of the 1995 Regulations. Their failure to do so rendered the decision to dismiss the respondent unsustainable in law.

[49] It was for all the reasons aforesaid that we unanimously dismissed the appellants' appeal and affirmed the High Court decision.